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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

CAROLINE MOSS, aka GIGI MARTINE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

Statement of the Case.

The petitioner, Caroline Moss, also known as Gigi Martine, was convicted of a violation of Section 41.02(b) of the Los Angeles Municipal Code, which provides as follows:

> Section 41.02 INDECENT SHOWS:
>
> "No person shall exhibit or perform, or participate in the presentation of any obscene, indecent or lewd play or representation."

Subsequent to a jury's verdict of guilty, and prior to the pronouncement of sentence, petitioner, by oral motion, moved for a new trial which motion was denied. Thereafter, sentence was pronounced.

An appeal was taken to the Appellate Department of the Superior Court of the State of California, which court is the court of last resort in the State of California for misdemeanor violations. The Appellate Department of the Superior Court of the State of California affirmed the trial court's denial of petitioner's motion for new trial, dismissed her appeals from the denial of her motion in arrest of judgment and denied her request to set aside the verdict. A Petition for Rehearing was denied on August 11, 1961.

Statement of the Evidence.

Petitioner performed a burlesque act at the Bamboo Room which establishment was, and is, located within the City of Los Angeles. Sergeant DeCamp filmed three minutes and forty-five seconds of her ten minute act of October 6, 1960. [Rep. Tr. p. 39, lines 18-21; p. 132, lines 12-15.][1]

Sergeant DeCamp and Sergeant Milburn both testified that the film [People's No. 1] substantially portrays the October 6, 1960, performance of Gigi Martine at the Bamboo Room. [Rep. Tr. p. 75, lines 9-21; p. 77, lines 22-25; p. 247, lines 21-24; p. 248, line 23.]

Though Sergeant DeCamp had but approximately four minutes of film in the camera, he attempted to get all of the petitioner's act. Whenever she became repetitious or continuously moved in a circular pattern, he would stop until she entered a new movement. [Rep. Tr. p. 136, lines 2-10.] In addition, the camera used to film the incident is a 16 millimeter Bell and

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[1]All references to pages are to the original Reporter's Transcript and not the C. C. T. R.

Howell that is hand wound and has a 12 foot run down [Rep. Tr. p. 69, lines 10-12; p. 69, lines 17-18], which periodically necessitated a cessation of the filming in order to rewind the camera. [Rep. Tr. p. 7, lines 10-13.]

I.

Section 41.02(b) of the Los Angeles Municipal Code Is Neither Vague, Indefinite, Uncertain nor Unintelligible.

A penal statute must set up ascertainable standards so that men of common intelligence are not required to guess at its meaning, either as to persons within the scope of the act or as to the applicable tests to ascertain guilt. (*Winters v. New York* (1947), 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.) However, the courts do not require the impossible from the legislature; all that is necessary is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. (*Roth v. United States* (1957), 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498.) No more than a reasonable degree of certainty is demanded; it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct take the risk that she may cross the line.

> *Boyce Motor Lines, Inc. v. United States* (1951), 342 U. S. 337, 72 S. Ct. 329, 96 L. Ed. 367.

The words "obscene", "lewd", "lascivious", "filthy", and "indecent" do not violate the constitutional requirement of due process for the statutory language, ap-

plied according to the proper standards for judging obscenity, give adequate warning of the conduct proscribed and mark the boundaries distinctly enough for judges and juries fairly to administer the law. (*Roth v. United States, supra*). Thus, the terms "obscene", "indecent", and "lewd", as employed in Section 41.02 of the Los Angeles Municipal Code, are neither vague nor indefinite.

Words of common understanding need not be defined. (*People v. Sanderson* (1961), 190 A. C. A. 802.) Most certainly the term "exhibit" is commonly understood and, in addition, has a definite meaning in California (*Pecht v. Colby Management Corp.* (1933), 131 Cal. App. 2), as does the term "exhibition". (*In re Harvell* (1959), 168 Cal. App. 2d 490, 335 P. 2d 1016.) In any event, that is certain which can be made certain by simple reference to the dictionary. (*People v. Vaughn* (1961), 196 A. C. A. 710, 719.)

Section 41.02(b) of the Los Angeles Municipal Code makes it unlawful to perform as well as exhibit one's self in an obscene or indecent play or representation. Notwithstanding the zeal of petitioner in her attempt to forego the consequences of her performance, the ordinance conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Having transgressed the line, and performed in the proscribed manner, she assumed the risk of criminal prosecution.

II.

Section 41.02(b) of the Los Angeles Municipal Code Has a "Built in" Knowledge Requirement; It Does Not Impose Absolute Liability.

Petitioner, in an attempt to argue absolute liability, cites *Smith v. California* (1959), 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, where this court declared Section 41.01.1 of the Los Angeles Municipal Code unconstitutional.

Section 41.01.1 of the Los Angeles Municipal Code provided as follows:

> "It shall be unlawful for any person to have in his possession any obscene or indecent writing book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:
>
> 1. In any school, school-grounds, public parks or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;
> 2. In any place of business where ice cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;
> 3. In any toilet or restroom open to the public;
> 4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

This ordinance was construed as imposing "strict" or "absolute liability", that is, criminal liability without any knowledge by a defendant of the contents of the books for the possession of which he was convicted. In the *Smith* case the court declared this Municipal Code section unconstitutional, because, by not requiring scienter on the part of the bookseller, it had such a tendency to inhibit constitutionally protected expression it could not stand under the Federal Constitution.

Pursuant to Section 41.01.1 of the Los Angeles Municipal Code, and prior to the *Smith* case, a bookseller could have but one obscene book in his bookstore, which store contained a thousand others, and though he had no knowledge of the contents of the one obscene book criminal sanctions could be imposed. Such a law, imposing "absolute liability", could curtail the distribution of constitutionally protected material. However, the case of a bookseller differs from the performer of an indecent act.

Though petitioner contends Sections 41.01.1 and 41.02(b) are "sister sections," Section 41.02(b) has a "built-in" knowledge requirement. Essentially, Section 41.02(b) makes it unlawful for a person to exhibit, perform or participate in an obscene show. Section

1963 of the California Code of Civil Procedure provides as follows:

> "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind: . . .
>
> 3. That a person intends the ordinary consequence of his voluntary act."

A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of her own acts. (*People v. Renoso* (1952), 109 Cal. App. 2d 793, 241 P. 2d 628.) Unless a person be an abject lunatic or a person of very tender years, he intends the natural and probable consequences of his own acts. This statement is but a truism. Petitioner is neither an abject lunatic nor a person of very tender years and, by performing an obscene dance, she knew and intended to perform in this manner. By the mind regulating and controlling the movements of her body, she knew and intended them for she could not help but know and intentionally perform in the manner in which she did. Thus, to hold that one who performs an obscene dance is guilty of a misdemeanor is but to proscribe an act which the performer intends.

III.

Preemption of a Municipal Ordinance by the State Is Not a Federal Question. Furthermore, the State Court Has Ruled the Municipal Ordinance Has Not Been Preempted.

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." (Art. XI, Sec. 11, Cal. Const.)

The argument of preemption is an argument that the Constitution of the *State of California* has been violated by the municipal ordinance. It is not an argument predicated upon the United States Constitution or infringement of any federal right and accordingly presents no federal issue.

It is a basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts. (*Speiser v. Randall* (1958), 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460). The construction of local statutes by local courts must be accepted by Federal Courts.

> *Waters Pierce Oil Co. v. Texas* (1900), 177 U. S. 28, 20 S. Ct. 518, 44 L. Ed. 657.

The United States Supreme Court accepts the decision of the highest state court that the Constitution of the State is not violated by a particular statute. (*Porter v. Wilson* (1915), 239 U. S. 170, 36 S. Ct. 91, 60 L. Ed. 204.) So far as concerns the application of the state constitution, the ultimate determination of the validity of a statute rests with the state court.

> *Glenn v. Field Packing Co.* (1933), 290 U. S. 177, 54 S. Ct. 138, 78 L. Ed. 252.

The Federal Courts are bound by the construction put by a state court upon a municipal ordinance, and the state court's decision as to whether a municipal ordinance is invalid as conflicting with a state statute.

Chicago v. Fieldcrest Dairies (1941), 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355.

The court of last resort of the State of California for such matters to wit, the Appellate Department of the Superior Court of the State of California, has ruled that Section 41.02(b) of the Los Angeles Municipal Code has not been preempted by the state. Such an issue is a state problem; it presents no federal question. The state court having previously ruled upon this matter, it is binding upon the Federal courts (cases cited)

IV.

The Jury Was Properly Instructed as to the Law of Obscenity.

The jury was instructed as follows:

"You are instructed that subdivision (b) of section 41.02 of the Los Angeles Municipal Code, insofar as it applies to this case provides that: No person shall exhibit or perform, or participate in the presentation of any obscene, indecent or lewd play or representation.

"Nudity, in and of itself, standing alone, is not obscene.

"The words 'obscene', 'indecent', 'lewd', as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. You should ask yourselves whether the performance, *considered as a*

whole (emphasis ours), has a substantial tendency to deprave or corrupt its viewers by inciting lascivious thoughts or lustful desires.

"The test is not whether it would arouse such thoughts and desires in those comprising a particular segment of the community, the young, the immature, or the highly prudish, or would leave another segment, the scientific or highly educated, or the so-called worldly-wise and sophisticated, indifferent and unmoved. The true test is the effect of the performance, considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. You should properly ask yourselves, does it offend the common conscience of the community by present-day standards? You, ladies and gentlemen, are the exclusive judges of what the common conscience of the community is, and in determining that conscience, you are to consider the community as a whole."

There is no denial of due process to petitioner to the above instruction. It exemplifies, almost literally, the tests in the *Roth* and *Alberts* cases.

Roth v. United States (1957), 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1498;

Alberts v. California (1957), 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1498.

Petitioner likewise attempts to review the evidence in the light most favorable to her, thus ignoring the general proposition that the evidence is resolved in favor of the verdict.

While it is true that the police officers filmed but three minutes and forty-five seconds of her ten minute act, it is also true that this three minute and forty-five second film substantially portrayed the petitioner's entire performance. Whenever petitioner became repetitious or continuously moved in a circular movement the camera was stopped. It was also necessary to stop periodically in order to rewind the camera. Two police officers testified that the film substantially portrayed petitioner's performance (see Statement of the Evidence). In addition, the jury was instructed that it is necessary to consider the performance as a whole in order to determine whether it was obscene. Thus, the jury, in order to return its guilty verdict, had to conclude that the film did substantially portray her entire performance and the *performance* was obscene.

There is no denial of due process to petitioner for the film substantially portrayed her entire performance and the court properly instructed the jury.

V.

No Federal Question Is Presented Where the Court Refuses to Allow the Jury to View Burlesque and Does Not Allow an Expert to Testify Concerning a Dance He Did Not See. Petitioner Did Not Attempt to Introduce Evidence of Contemporary Community Standards.

No federal question is presented by the lower court's denial of petitioner's motion to have the jury view burlesque. Such "strippers" do not determine whether a dance is obscene nor do they dictate the morals of society.

Petitioner likewise contends she was thwarted in her attempt to introduce evidence of contemporary community standards. This is not true. She intended to

call Valentine Froman, her ballet instructor, who would relate to the jury the purported artistic value of a performance he did not see. [Rep. Tr. p. 581, lines 15-26; p. 582, lines 1-2.] This raises no federal issue.

Furthermore, petitioner did *not* attempt to introduce evidence of contemporary community standards. [Rep. Tr. p. 581, lines 23-26; p. 582, lines 1-3.] Thus, there was no denial of due process to petitioner. (*In re Albert J. Harris*, Supreme Court of the State of California, Crim. No. 6962, filed November 22, 1961.)

VI.

Other Grounds Asserted by Petitioner Do Not Raise a Federal Question.

Petitioner's claim as to restriction of cross-examination, alleged inconsistent verdict, alleged misconduct of the prosecutor, denial of certain requested instructions, and the court's refusal to allow the camera in evidence, patently do not raise a federal question.

Conclusion.

There having been no violation of petitioner's rights under the Federal Constitution, and the highest court of the State of California not having decided a federal question in conflict with decisions of this court, or decided a federal question, respondent prays that the petition be denied.

Respectfully submitted,

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